

CIRCULAR.

HEADQUARTERS, DEPARTMENT OF THE GULF,

OFFICE OF THE JUDGE ADVOCATE,

New Orleans, October 12, 1863.

The following instructions and extracts relating to Courts Martial are published for the information and guidance of the troops of this Department :

ACTS OF CONGRESS.

Act approved July 17, 1862, entitled, "An Act to amend the law calling forth the militia to execute the laws of the Union," etc. :

SECTION 7.—"That hereafter, all offenders in the army charged with offenses now punishable by a regimental or garrison court martial, shall be brought before a field officer of his regiment, who shall be detailed for that purpose, and who shall hear and determine the offense and order the punishment that shall be inflicted, and shall also make a record of his proceedings, and submit the same to the brigade commander, who, upon the approval of the proceedings of such field officer, shall order the same to be executed : *Provided*, That the punishment in such cases shall be limited to that authorized to be inflicted by a regimental or garrison court martial : *And provided, further*, That in the event of there being no brigade commander, the proceedings as aforesaid shall be submitted for approval to the commanding officer of the post."

Agreeably to instructions from the Judge Advocate General, the foregoing section will be so construed as to abolish regimental and garrison courts martial in those cases only where a field officer of the regiment of the accused is present and subject to detail. In all other cases, regimental and garrison courts martial will be resorted to as heretofore.

Act approved December 24, 1861, entitled, "An Act relative to Courts Martial in the Army : "

CHAPTER 3.—"That in time of war, the commander of a division or separate brigade may appoint general courts martial, and confirm, execute, pardon and mitigate their sentences, as allowed and restrained by the 65th and 89th Articles of War to commanders of armies and departments : *Provided*, That sentences of such courts extending to loss of life or dismissal of a commissioned officer, shall require the confirmation of the general commanding the army in the field* to which the division or brigade belongs : *And provided, further*, That when the division or

* Here, the Department Commander.

brigade commander shall be the accuser or prosecutor, the court shall be appointed by the next higher commander."

When the authority convening the court has not the power to carry the sentence into execution or to remit it, as in a capital case or in the case of the dismissal of a commissioned officer, it is still his duty, before forwarding the proceedings, to endorse on them his opinion. Sentences of death or cashiering an officer can only be remitted by the President.

Act approved July 17, 1862, entitled, "An Act to amend the act calling forth the militia to execute the laws of the Union," etc. :

SECTION 5.—"And no sentence of death, or imprisonment in the penitentiary, shall be carried into execution until the same shall have been approved by the President."

All commanders who have power to appoint General Courts Martial are authorized to appoint Military Commissions. None, save the President of the United States, can appoint Courts of Inquiry, unless an application for one is made by the officer whose conduct is to be examined. In the latter case, any authority competent to order a General Court Martial can appoint a Court of Inquiry.

The proceedings of all General Courts Martial, Military Commissions and Courts of Inquiry, together with copies of the orders issued thereon, will be forwarded, with the action of the reviewing officer indorsed thereon, and a copy of the order promulgating the proceedings, to the Adjutant General of the Army, marked on the cover, "*Judge Advocate*."

Act approved March 3, 1863, entitled, "An Act for enrolling and calling out the National Forces, and for other purposes :"

SECTION 21.—"*And be it further enacted*, That so much of the fifth section of the act approved seventeenth July, 1862, entitled, 'An Act to amend an act calling forth the militia to execute the laws of the Union,' and so forth, as requires the approval of the President to carry into execution the sentence of any court martial, be and the same is hereby repealed, as far as relates to carrying into execution the sentence of any court martial against any person convicted as a spy or deserter, or of mutiny or murder ; and hereafter, sentence in punishment of these offenses may be carried into execution upon the approval of the commanding general in the field."

SECTION 22.—"*And be it further enacted*, That courts martial shall have the power to sentence officers who shall absent themselves from their commands without leave, to be reduced to the ranks, to serve three years or during the war,"

SECTION 30.—"*And be it further enacted*, That in time of war, insurrection or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punished by sentence of a general court martial or military com-

mission, when committed by persons who are in the military service of the United States and subject to the Articles of War; and the punishments for such offenses shall never be less than those inflicted by the laws of the State, Territory or District in which they may have been committed."

THE RECORD.

Par. 893, Revised Army Regulations—

"The record shall be clearly and legibly written; as far as practicable, without erasures or interlineations." The disinclination of the Judge Advocate to rewrite a portion of the proceedings, is no excuse for the transmittal of an imperfect record, which may necessitate the reconvening of the court.

THE CHARGES.

De Hart's Military Law, pp. 313, 314—

"It is the essential duty of the Judge Advocate to see that the charges which have been committed to him for prosecution are presented to the court in a legal form, and with such distinctness that they shall correspond to the requirements indicated in a preceding chapter. When charges are furnished to the Judge Advocate from Headquarters in a specific form, there may be some doubt as to the right of making any alterations therein; and therefore, should any defect be seen, he had better call the notice of the proper authority to it, whenever time and distance will permit. It is undoubtedly, however, his duty to amend the legal defects of charges before the prisoner is called upon to plead thereto, for this seems to be an essential part of his business; yet in so doing he is to be held strictly responsible that the facts are not changed nor the legal responsibilities of the accused weakened. There is an order embodying the above regulations for the guidance of the Judge Advocates still in force, and to such may reference be had for the exercise of the rights or powers here alluded to. The changes which are most frequently needed to be made are mostly confined to form and phraseology—to simplify the first and prune the redundant fullness of the other comprise the ordinary elements for notice. As has been previously remarked, that the manner in which charges are drawn up is a primary requisite for the doing of justice in general, and of peculiar value in isolated cases, it would seem to be a necessity that the person upon whom is devolved the onus of the prosecution should likewise be of such fitness as to be entrusted with the responsibility, and endowed with the discretion, to change or modify the charges, either as legal necessity or practical rules shall require."

Benét's Military Law and Courts Martial, p. 89—

"The officer who appoints the court finds the true bill of indictment, but the Judge Advocate, as prosecutor for the United States, has *official right to make the charges technically correct.*"

The looseness with which charges are generally drawn, and the neglect of Judge Advocates to correct the fault, makes it necessary to call their attention to this subject. They will be held responsible for the performance of this duty.

The following rules must be strictly observed in drawing charges :

A charge must refer to but one military offense. When the accused is charged with several offenses they must be made subjects of separate charges.

"When an offense is of that specific quality as to be reduceable to a particular Article of War, to which a known and distinct penalty is attached, it must be prosecuted under such article, that the intent of the law and the purposes of justice may be answered." G. O. No. 18, War Department, July 23, 1859. The charge should be described, as far as possible, in the language of that article. Care must be taken not to charge an offense as a "violation of a particular Article of War," when that article embraces several offenses, or when it is affirmative and declaratory, and not prohibitory. Strictly speaking, the violation of such a statute, which affixes simply a certain punishment to a certain crime, and does not forbid the commission of that crime, would consist in not suffering the punishment prescribed.

Benét, p. 52—

"Under whatever article a charge is laid, the specification to it must state the act in terms appropriate to that article, and not in terms which necessarily refer to some other article." Distinct acts, differing in character, though all going to prove the same charge, should not be joined in the same specification.

The specification should be clear and explicit, and should fully describe the accused, and the act or omission with which he is charged. When time and place are material to the charge, they should be accurately stated; otherwise, it is sufficient to say "*at or near*" such a place, "*on or about*" such a day. It is impossible here to enter into the details of this subject. A little judgment and reflection will enable the most inexperienced to draw charges in accordance with the requirements of the law. It is carelessness alone which has produced the looseness that has hitherto characterized them.

PLEA OF GUILTY—EVIDENCE.

GENERAL ORDERS, }
No. 91. }

HEADQUARTERS, ARMY OF THE POTOMAC,
September 19th, 1863.

I. The following letter from Judge Advocate General Holt is published for the information of this Army :

"JUDGE ADVOCATE GENERAL'S OFFICE,
September 12th, 1863.

MAJOR GENERAL GEORGE G. MEADE :

General:—Your letter of the 28th August has been received and considered.

It would not be competent for you, by any General Order, to control parties in their pleas, when arraigned before a General Court Martial. If they insist upon pleading Guilty, they cannot be prevented from doing so. The technical rule of practice, however, which forbids the introduction of testimony, when the plea of Guilty has been entered, may well be relaxed, and should be, in capital cases, for

the reasons you mention. It is essential to the ends of public justice, and to enable the reviewing officer to act understandingly, that when circumstances, either of aggravation or mitigation exist, they should be spread upon the record. An order, on your part, directing this course to be pursued in capital cases, by Judge Advocate, would supply what has been constantly felt to be a pressing want in the administration of military justice.

Very respectfully, your obedient servant,

(Signed)

J. HOLT, *Judge Advocate General.*"

II. In pursuance of the above, it is hereby ordered, that in capital cases which are tried by Courts Martial in this Army, the Judge Advocate of the Court shall introduce all the testimony in his power, whether the accused plead Guilty or Not Guilty.

III. The Commanding General cannot too severely rebuke the extreme negligence which has been manifested recently, before several Courts Martial in this Army, in cases of alleged desertion. After the proceedings have been confirmed and execution ordered, testimony has been brought forward which should have been developed before the Court, and which, if this had been done, must have materially affected its action. It is not understood how Courts and Judge Advocates, acting under the solemnity of an oath, and with the life of a fellow soldier depending on their action, can be so criminally negligent.

IV. Judge Advocates, in future, will not limit themselves to a mere examination of the witnesses named in the charges, but will use every means to develop the case in all its bearings before the Court.

V. In cases of alleged desertion, where the accused has been apprehended and returned under arrest, it ought, if possible, to be shown when, where, and under what circumstances the apprehension took place; whether the accused was in uniform or citizen's clothes when the arrest was made; the story he told when arrested; in short, every thing tending to show the intention of the accused, should be laid before the Court.

VI. In all capital cases the accused should be made fully to understand the critical situation in which he is placed, and every facility should be given him to introduce testimony in his defence. If there is any reason to suppose he is deficient in intellect, the testimony of Medical Officers should be taken as to his mental condition.

VII. Reviewing officers will always enter their opinion on the record of the Court immediately after the close of the proceedings in each case, and not, as is frequently the practice, endorse it upon the back of the record.

BY COMMAND OF MAJOR GENERAL MEADE :

S. WILLIAMS,

Assistant Adjutant General.

FORMS.

As works on military law are not always accessible, the following forms will be found useful :

CHARGE.—“*Desertion.*”

SPECIFICATION—“In this, that he, Private John Doe, of Company A, 75th Regiment Pennsylvania Volunteers, having been duly enlisted into the service of the United States, did desert the same, by absenting himself, without leave, from his company and regiment, while stationed at or near camp near Yorktown, Va., on or about the 30th day of April, 1862, and remaining absent therefrom until apprehended at or near camp near Harrison's Landing, on or about the 3d day of August, 1862.”

CHARGE.—“*Deserting his Post.*”

SPECIFICATION—“In this, that he, Private ———, of Company ———, ——— Regiment ———, having been duly detailed on regimental guard and posted as sentinel, did leave his post without permission, and before he was regularly relieved. All this,” etc., etc.

CHARGE.—“*Disobedience of Orders.*”

SPECIFICATION—“In this, that he, First Lieutenant A. B., 1st Regiment of Infantry United States Army, having received orders of the Commanding General of the Army, in New York, on the ——— day of February, 185—, to proceed on the ——— day of March, 185—, to join his company, did disobey said orders ; and did, without leave and in disobedience of said orders, remain absent from his company, and from duty, till on or about the ——— day of July, 185—.”

CHARGE.—“*Conduct unbecoming an Officer and a Gentleman.*”

SPECIFICATION—“In this, that he, First Lieutenant ———, ——— Regiment ———, did positively deny, to one or more commissioned officers, that he had played at cards with Private ———, or any other enlisted man of the command, which denial was false. This at,” etc., etc.

Benét, p. 333—

“Under the 99th Article of War, ‘all crimes not capital, and all disorders and neglects, to the prejudice of good order and military discipline,’ must be taken cognizance of by courts martial. Therefore, any crime, disorder or neglect, not specified in some of the other articles, must be charged under this general article, the 99th thus :

‘Conduct to the prejudice of good order and military discipline.’

‘Neglect of duty, to the prejudice of good order and military discipline.’

‘Insubordinate conduct, to the prejudice,’ etc.

‘Tyrannical conduct, to the prejudice,’ etc.

‘Disorders and neglects, to the prejudice,’ etc., etc., etc.”

CHARGE.—“*Violation of the 42d Article of War.*”

SPECIFICATION—“In this, that First Lieutenant ——— did leave his regi-

ment and lie out of camp, without the permission of his commanding officer. This at, etc., on or about the night of the 16th of October, 1862."

MODE OF RECORDING THE PROCEEDINGS OF A COURT MARTIAL.

Proceedings of a General Court Martial which convened at West Point, by virtue of the following Special Order.

[Here insert a copy of the order.]

WEST POINT, N. Y., March 5th, 186-.

10 A. M. The Court met pursuant to the foregoing order.

Present,	*	*	*	*	*	*
	*	*	*	*	*	*
Absent,	*	*	*	*	*	*
	*	*	*	*	*	*

The Judge Advocate read a communication from Captain C., stating the cause of his absence, etc.; the letter is appended and marked—.

"The cause of Captain B.'s absence not known."

The Court then proceeded to the trial of Lieutenant X. Y., — Regiment of Infantry, who was called before the Court, and having heard the order appointing the Court read, was asked if he had any objection to any member named in the order. The accused objected to Captain——, and stated the cause of his challenge, as follows:

[Here insert the statement.]

Captain —— remarked, etc.

The Court was cleared, the challenged member retiring; and after due deliberation the doors were opened, the accused and challenged parties present, and the decision of the Court was announced by the Judge Advocate, "That the challenge is sustained as sufficient, and that Captain —— is excused from serving as a member of the Court."

The accused having no objections to any of the other members, the Court was then duly sworn by the Judge Advocate, and the Judge Advocate by the President, in the presence of the prisoner.

The accused appealed to the Court, to be permitted to introduce M. N., Esq., as his counsel, which application was granted, and he appeared as counsel for the accused.

The accused, Lieutenant X. Y., — Regiment of Infantry, was arraigned on the following charge and specification:

Charge—Drunkenness on duty.

Specification—In this, that he, Lieutenant X. Y., of the —— Regiment of Infantry, was drunk while on duty at company drill. All this at ——, on or about the 10th day of January, 186-.

To which charge and specification the accused pleaded as follows :

To the specification—"Not Guilty."

To the charge—"Not Guilty."

Captain O. P., 5th Artillery, a witness for the prosecution, was duly sworn.

Question by Judge Advocate.

Answer.

Question by Judge Advocate.

Answer.

Question by defense.

Answer.

Question by defense.

Answer.

Question by Judge Advocate.

Answer, etc.

The prosecution here closed.

Lieutenant R. S., 7th Infantry, a witness for the defense, was duly sworn.

Question by defense.

Answer.

Question by Judge Advocate.

Answer.

Question by the defense.

Answer.

Question by the Court.

Answer, etc.

The accused having no further testimony to offer, requested until to-morrow to prepare his final defense. The Court granted his request, and adjourned to meet again at 10 o'clock, A. M., to-morrow, the 6th inst.

H. E. M., Captain 10th Infantry, Judge Advocate.

WEST POINT, N. Y., March 6th, 186-.

10 A. M. The Court met pursuant to adjournment.

Present the same members as yesterday, the Judge Advocate, and the counsel for the accused.

The proceedings of yesterday having been read by the Judge Advocate, the accused, Lieutenant X. Y., presented the written address, (appended and marked —) which was read by his counsel in his defense.

The Judge Advocate submitted the case to the Court without remark.

The Court was then cleared for deliberation, and having maturely considered the evidence adduced, finds the accused, Lieutenant X. Y., of the — Regiment of Infantry, as follows :

Of the specification—"Guilty."

Of the charge—"Guilty."

And the Court does therefore sentence him, Lieutenant X. Y, of the — Regiment of Infantry, to be cashiered.

G. D. R., Lieut. Col. of Ordnance, President.

H. E. M. Captain 10th Infantry, Judge Advocate.

There being no further business before the Court, it adjourned *sine die*.

G. D. R. Lieut. Col. of Ordnance, President.

H. E. M., Captain 10th Infantry, Judge Advocate.

THE VERDICT.

Benét, p. 129, et seq.—“Instead of a general verdict of guilt or acquittal upon the whole of every specification, the Court may find a *special verdict*—that is, the accused be found guilty of a portion of the specification, and not guilty of the remainder; or may find him guilty of the facts set forth in the specification, but attach no criminality thereto; or may find him guilty of a portion, and find the facts as stated in the remainder, but declare them void of criminality. The prisoner must, however, be acquitted or convicted of every part of each of the several specifications and charges of which he stands accused, and the decision of the court in all their findings must be specific, so that the quantum of punishment inflicted may be seen to be proportionate to the degree of guilt.

The accused may be found guilty of the entire facts set forth in the specifications, and yet be acquitted of the charge. This may happen in constructive charges, when the essence of the charge and the guilt of the prisoner rests on imputations built on facts alleged in the specifications—as that there was a criminal knowledge or intent—but of which he has been cleared by the testimony.

* * * It is not necessary, in military charges, to allege that the acts were done ‘maliciously,’ or ‘wilfully,’ or ‘knowingly.’ A specification of fact is good without such expressions. But if they are alleged and negatived by the court in their verdict, then the inference from the fact fails, and the accused being acquitted of the intention, is acquitted of the offense.

* * * Although it be settled that a prisoner cannot be convicted of an offense *different* from that with which he is charged, it is equally well established that a court martial *can* convict of a lesser degree of the same offense alleged against him. It is therefore necessary to note the distinctions, if any, between the crime charged and the actual degree of offense proved. A prisoner may be acquitted of the charge of *desertion*, but be convicted of the lesser offense of *absence without leave*. Although these two offenses are to be found in two distinct Articles of War, yet desertion is but an aggravated degree of the crime of absence without leave, and necessarily includes it; the *intention not to return* constituting the aggravation. * * *

While the court may convict of a lesser kindred offense, it cannot, under any circumstances, find the accused guilty of a higher degree of criminality than that alleged in the charge.

The various degrees of culpability must be taken into consideration for every act that may be divided into offenses of greater or less magnitude, and the court should confine themselves to the evidence of the crime specified, when deliberating upon the question of guilt or innocence. Any evidence in mere *palliation* or *extenuation* must be allowed its due *effect upon the sentence*, and not upon the finding. A soldier striking his superior officer, being in the execution of his office, must be found guilty of a violation of the 9th Article of War—mutiny—and the extenuating circumstance that he struck under the wild excitement of excessive provocation can only be considered when deciding upon the sentence.

THE SENTENCE.

The sentence must be clearly expressed, must be in accordance with the finding, and where the mode of punishment is laid down by law, the law must be strictly followed; otherwise it must be determined by "the custom of war in like cases."

BY COMMAND OF MAJOR GENERAL BANKS :

G. NORMAN LIEBER,

Judge Advocate.

Reports of Killed and Wounded.

[General Orders, No. 355.]

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, Nov. 4, 1863.

Medical Directors of armies in the field will forward, direct to the Surgeon General, at Washington, duplicates of their reports to their several Commanding Generals of the killed and wounded after every engagement.

By order of the Secretary of War:

E. D. TOWNSEND,
Assistant Adjutant General.

Leaves of Absence.

[General Orders, No. 383.]

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, Nov. 30, 1863.

I. Commanders of geographical departments are authorized to grant leaves of absence in accordance with the General Regulations of the Army; but all officers, of whatsoever grade, are prohibited from visiting the city of Washington without the special permission of the War Department.

II. To serve as a check upon the abuse of the authority conferred by the foregoing paragraph, a report of all leaves granted will be made monthly to the Adjutant General of the Army, stating their length and dates, and the reasons for granting them.

III. No application for extension of leaves of absence will be granted by the War Department unless such extension is recommended by the officer granting the leave.

By order of the Secretary of War:

E. D. TOWNSEND,
Assistant Adjutant General.

Hospital Nurses.

[General Orders, No. 390.]

WAR DEPARTMENT,
ADJUTANT GENERAL'S OFFICE,
WASHINGTON, Dec. 8, 1863.

Officers of the Medical Department, in charge of all general hospitals, are authorized to employ as cooks or nurses either males or females, who will be paid by the Medical Purveyor or Storekeeper at the rate of ten dollars per month.

In cases where white females are employed they will receive forty cents per day. All such persons will also receive one ration per day.

By order of the Secretary of War:

E. D. TOWNSEND,
Assistant Adjutant General.